Supreme Court, U.S.
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No. 05-49

In The

Supreme Court of the United States

JANICE L. CONLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether it is a fundamental miscarriage of justice to impose sentence in violation of the Fifth and Sixth Amendments to the United States Constitution under *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738, 73 USLW 4056 (2005). Specifically, whether the imposition of a federal sentencing guideline sentence was tantamount to imposition of a minimum mandatory sentence, because imposition of a guideline sentence was *mandatory* under the guidelines in effect prior to *Booker*. For a judge to be *required* by then existing law to impose what amounted to a minimum mandatory forty-one month prison sentence on a fifty-six year old woman with no prior criminal record for a white collar fraud offense with a relatively small loss amount, by a sentencing scheme that is now held to be *unconstitutional* is a fundamental miscarriage of justice; or alternatively, whether the procedural bar rule of *United States v. Frady*, 456 U.S. 152, 167-168, 102 S.Ct. 1584, 1594 (1982) must be waived, altered or abandoned in the context of the revolutionary upsetting of the federal sentencing guidelines and the sentences wrongly imposed under this unjust *pre-Booker* mandatory guideline scheme.

II. Whether *Booker* is not a "new rule" for purposes of retroactivity analysis under *Teague v. Lane*, but is merely an application of the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), to a new set of facts because the result in *Booker* was dictated and compelled by *Apprendi*, and therefore under *Yates v. Aiken*, 484 U.S. 211, 108 S.Ct. 534 (1988) and *Penry v. Lynaugh*, 492 U.S. 302, 314-315, 109 S.Ct. 2934, 2944-2945 (1989), Conley is entitled to the application of *Booker* to her timely first petition under 28 U.S.C. § 2255.

QUESTIONS PRESENTED – Continued

III. Alternatively, whether the *Booker* rule is entitled to retroactive application under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989).

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, **JANICE L. CONLEY**, respectfully prays that a writ of certiorari issue to review the decision of the Eleventh Circuit Court of Appeals entered March 25, 2005 affirming without written opinion the denial of a certificate of appealability ("COA") by the United States District Court for the Middle District of Florida, of an appeal of a denial of a petition for relief under Title 28, United States Code, § 2255, based on a claim made under *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738, 73 USLW 4056 (2005).

OPINION AND DECISION BELOW

The decision without opinion of the Eleventh Circuit Court of Appeals (Appendix, *infra*, 1) was unreported. The decision and opinion of the Middle District of Florida denying relief under 28 U.S.C. § 2255 was also unreported but a copy of that decision and opinion is included in the Appendix, *infra*, 9.

JURISDICTION

Petitioner **JANICE L. CONLEY** filed in the United States District Court for the Middle District of Florida, Orlando Division, a timely motion under 28 U.S.C. § 2255 attacking the judgment and sentence in her federal criminal case. The original § 2255 motion was filed August 4, 2004, after *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004), but prior to the decision in *United States v. Booker*, 543 U.S. __, 125 S.Ct. 738, 73 USLW 4056 (2005). Conley argued in her 2255 motion

that *Blakely* applied to the federal sentencing guidelines and that as the imposition of a mandatory guideline sentence violated her Fifth and Sixth Amendment rights. Conley elaborated that she was entitled to the application of *Blakely* to her initial, timely 2255 motion, because *Blakely* was not a "new rule" for retroactivity analysis purposes, but merely an extension of an existing rule, *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), a rule announced prior to her sentencing, therefore she was entitled to this extension of a new rule; alternatively Conley argued that *Blakely* should be applied retroactively under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989). The District Court summarily denied Conley's 2255 motion on August 24, 2004 on *Frady* procedural bar grounds (*United States v. Frady*, 456 U.S. 152, 167-168, 102 S.Ct. 1584, 1594 (1982)) and denied her request for a certificate of appealability ("COA") on October 25, 2004. Conley renewed her request for a COA at the Eleventh Circuit Court of Appeals which denied the COA on December 27, 2004. Conley then filed a motion styled Petition for Rehearing En Banc, which the Eleventh Circuit treated as a motion for reconsideration which was denied by an order signed by Judges Birch and Barkett and filed March 25, 2005. This petition followed in a timely manner. This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eleventh Circuit pursuant to Title 28 U.S.C. § 1254(1). *Hohn v. United States*, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment to the United States Constitution provides:

> Amendment VI. Jury trials for crimes, and procedural rights
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.